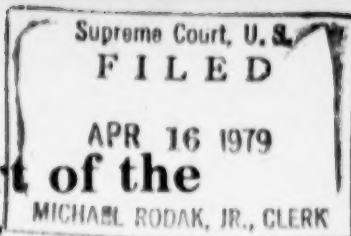


**In the Supreme Court of the
United States**

OCTOBER TERM, 1978

No. _____

78-1584



ROBERT DEWAIN MILL,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

**PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
COURT OF ALASKA**

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**PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALASKA**

Petitioner, Robert Dewain Mill, respectfully prays that a writ of certiorari issue to review the judgment of the Alaska Supreme Court entered in the above-entitled case on October 20, 1978.

OPINION BELOW

The opinion of the Alaska Supreme Court, affirming the petitioner's conviction, is reported in *Mill v. State*, 585 P.2d 546 (Alaska 1978), and is printed in Appendix A.

JURISDICTION

The judgment of the Alaska Supreme Court was entered on October 20, 1978. A timely petition for rehearing, printed in Appendix B, was filed with the court on October 30, 1978, and was denied without opinion on November 28, 1978. The mandate of the Alaska Supreme Court, which was issued on December 5, 1978 and affirmed petitioner's conviction, is printed in Appendix C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the prosecutor's argument to the jurors, that they may find petitioner guilty of a lesser included offense based on incidents not charged in the indictment, violated petitioner's fundamental rights protected by the sixth amendment and secured to him through the due process clause of the fourteenth amendment.

2. Whether the affirmance of petitioner's conviction by a minority of the appellate court derogated his right to appeal and therefore constituted an abridgement of his right to due process of law guaranteed under the fourteenth amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are set forth in Appendix D.

STATEMENT OF THE CASE

In early 1973, a dispute arose between petitioner and James Vincent. Petitioner had started a small independent logging business in Palmer, Alaska, in 1970. Petitioner and Vincent, a trucker, had entered into a contract whereby Vincent was to deliver lumber from Canada to petitioner's business [R.T. 922].¹ The dispute which arose involved the conversion by Vincent of a load of lumber for which petitioner had already paid Vincent. Petitioner was in desperate need of the load in order to fill his contracts. On July 6, 1973, petitioner realized that Vincent had no intention of delivering the lumber and had converted the same to his own use [R.T. 1021].

Petitioner then sought out Vincent for the delivery of the lumber or the return of his money. He found Vincent and the man he believed to be Vincent's bodyguard, along with several other men, drinking in a cabin [R.T. 1029]. At petitioner's request, Vincent stepped out onto the porch of the cabin to discuss the matter. Their discussion quickly turned into a confrontation when Vincent refused to honor petitioner's request for the delivery of the lumber, or, in the alternative, return petitioner's money [R.T. 1270]. Vincent thereafter returned to the cabin [R.T. 666, 695, 1033].

Knowing that it was likely that the men inside were armed, petitioner procured a rifle from his truck and walked back to the cabin. He approached a window of the cabin, laid his rifle across the sill, pointing it at Vincent [R.T. 246, 667, 695, 1035]. He commanded Vincent to step outside again. Vincent exited the cabin and began to approach petitioner. As Vincent reached toward his pocket, petitioner twice told him to stop [R.T. 1037, 1152-1153].

¹ Reporter's Transcript of the proceedings.

53]. Vincent continued towards petitioner and petitioner shot him in the leg in order to halt his approach [R.T. 1040, 1150-51, 1266].

After the shooting, Vincent acknowledged that he owed petitioner the money and petitioner assisted him in retrieving his checkbook. Petitioner covered Vincent with his rifle while Vincent wrote out a check for the converted lumber and then engaged the aid of another man in obtaining medical assistance for Vincent [R.T. 1048].

Petitioner was charged, on the basis of the actual shooting, in a one-count indictment with a violation of A.S. 11.15.150 as follows:

The Grand Jury charges: that on or about the 6th day of July, 1973, at or near Palmer, in the Third Judicial District, State of Alaska, Robert Dewain Mill did unlawfully, feloniously, and maliciously shoot James Douglas Vincent with the intent to kill, wound or maim him.

Trial commenced on July 7, 1975. During closing argument, the prosecutor was permitted to argue to the jury that the uncharged prior and subsequent pointings of the rifle by petitioner also constituted assaults with a dangerous weapon, in violation of A.S. 11.15.220, which the jurors could find petitioner guilty of as a lesser included offense:

Now, he was guilty of assault with a deadly weapon, or a dangerous weapon at the moment he came up there to that window and pointed that gun at Vincent. He didn't shoot the man with intent to kill. See that — a higher crime requires the actual shooting which he did a few seconds later, but at that point he was guilty of an ADW.

* * *

When he stood over the man and made him write out a check, there's another ADW right there. Assault with a deadly weapon, or a dangerous weapon. There's another one. There are 2 others. Of course when he shot the fellow, if you find that he didn't have the intent to kill, wound, or maim, there's another ADW right there [R.T. 1723-24].

The prosecutor was allowed to pursue this line of argument over petitioner's strenuous objections. Before the closing arguments, petitioner had requested that the trial judge issue:

[A] protective order directing Mr. Merriner that he cannot argue that the poking of the gun into the window was a separate, [sic] or could be found by the jury to constitute an assault with a dangerous weapon [R.T. 1669].

Moreover, petitioner had also requested that the trial judge issue a curative instruction² that the jurors could not find petitioner guilty of the lesser offense based on uncharged offenses:

I think the jury should be instructed that while they may find a lesser included offense of assault with a dangerous weapon, if they do not find the specific intent to shoot, kill, or wound — to kill, wound or maim, that that lesser included offense is — must be encompassed within the specific transaction, that is, the shooting. And that they cannot look for other possible acts of assault which were not charged in the indictment. There

²The pertinent portions of the reporter's transcript of the proceedings are set forth in Appendix E.

are 3 possible assaults with a deadly weapon in this case, if the jury were to believe that this is what happened. One when Mr. Mill stuck a gun through the window, one when he aimed at and shot the defendant in the leg, and (3), which is disputed, of course, when allegedly he stood over him with the gun and forced him to write a check. But the state has seen fit to give notice and to charge only one of these transactions, the actual shooting. And if the jury could find, as a lesser included offense, any conduct of the defendant other than the one in the middle, then theoretically they could find him guilty of 3 separate assaults with a dangerous weapon, and that would certainly exceed the scope of the indictment and the issues in this case, and therefore I'm going to ask the court at this time to give an instruction that the lesser included offense of assault with a dangerous weapon must be, if they find it, must be based upon the same acts or transactions which constituted the shooting. That they cannot consider other incidents that might have amounted to an assault with a dangerous weapon if so charged. [R.T. 1668-69].

The jury found petitioner not guilty of the offense charged in the indictment, but guilty of the lesser included offense of assault with a dangerous weapon.

Petitioner appealed his conviction to the Alaska Supreme Court. Although the issue of whether the prosecution's closing argument constituted error was clearly of constitutional character, the appeal was heard by only three of the five justices of that court. Of those three justices, two affirmed his conviction. Justice Burke, dissenting, determined that there was federal constitution-

al error. He concluded that allowing the prosecutor to argue separate, uncharged incidents as lesser included offenses, which the jurors could find petitioner guilty of, mandated a reversal and remand of the case.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE PRESENTED

On appeal to the Alaska Supreme Court, petitioner contended that the trial judge had prejudicially erred in permitting the prosecutor to argue, over objection, that the jury could find petitioner guilty of the lesser included offense of assault with a dangerous weapon based on separate, uncharged incidents. Petitioner further submitted that the error was compounded by the trial judge's refusal to issue a curative instruction. Moreover, petitioner maintained that the error had been of a federal constitutional dimension. Specifically, petitioner contended that the prosecutor's statements violated petitioner's right to be informed of the nature and cause of the accusations against him, a fundamental aspect of due process of law. It was further argued that petitioner's right to a unanimous verdict had been abrogated.

The Alaska Supreme Court's opinion indicates that it recognized the issue to be of federal dimension. The majority implied this determination when it acknowledged that the trial court had committed harmless error in allowing the prosecutor to argue that there had been three separate assaults to justify convicting petitioner. Clearly, the "state grounds" on which the Alaska Supreme Court purports to rely, in holding the error to be harmless, are inadequate. Moreover, adequate and tenable state grounds are inconsistent with an acknowledgment that the trial court had erred. Justice Burke's dissent on this issue verifies the timely and specific presentation of a federal question.

Anticipating the possibility that the timely presentation of the federal question may not be clear from the record, petitioner is currently engaged in the process of securing a certificate from the justices of the Supreme Court of Alaska who heard petitioner's appeal. This certificate will clarify the timely presentation and necessary determination of a substantial federal question.

The second federal question arose out of the circumstances of the Alaska Supreme Court's affirmance of petitioner's conviction. The injection of this federal question into the case could not have been anticipated. Accordingly, petitioner's assertion, that the affirmance of his conviction by less than a majority of the court is unconstitutional, was timely made when raised for the first time in his petition for rehearing.

REASONS FOR GRANTING THE WRIT

A. The Alaska Supreme Court's Decision Conflicts In Principle With Decisions Of This Court And Is In Conflict With Prior Decisions Of The Alaska Supreme Court.

This Court has recognized that the sixth amendment right of an accused to be informed of the nature and cause of the accusation against him is an essential principle of procedural due process:

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. [Citations omitted]. *Cole v. Arkansas*, 333 U.S. 196, 201 (1947). See also

In re Oliver, 333 U.S. 257, 273 (1947); *Chambers v. Mississippi*, 410 U.S. 284, 294-295 (1973).

Petitioner contends that the prosecutor's argument to the jury, that uncharged prior and subsequent pointings of the rifle could be adequate grounds for a finding of guilt of a lesser included offense, violated his rights as an accused. Petitioner submits that such a violation is in direct conflict with the principles expressed by this Court in cases such as *Chambers v. Mississippi*, and *Cole v. Arkansas*.

The Alaska Supreme Court's determination of petitioner's appeal is also erroneous on the basis of its own prior holdings on this issue. In *Drahosh v. State*, 442 P.2d 44 (Alaska 1968), the defendant had been convicted of negligent driving and an offense denominated as failure to remain at the scene of the accident. On appeal, the Alaska Supreme Court found the complaint, consisting of two counts, to have been duplicitous because it charged two separate violations in the second count. The purpose of the Alaska pleading rule proscribing duplicity, Alaska Criminal Rule 8(a), was recognized as flowing from an accused's sixth amendment right to be informed of the nature and cause of the accusation against him. The court held that the defect of the duplicity had been compounded by the failure of the trial judge to define the nature of the offense charged. The court further held that, under the circumstances, it was impossible to ascertain how the jury had reached its verdict. Accordingly, since there was a possibility that there had been no unanimity in the jury verdict as to either offense, the court reversed the defendant's conviction.

In *Whitton v. State*, 479 P.2d 302, 309 (Alaska 1970), the court held that an accused may not receive multiple punishments for the same criminal act. However, the

rationale of the *Whitton* decision has been used as both a shield and a sword against petitioner. Although it held that the principles of *Whitton* would probably have precluded charging petitioner with multiple counts and obtaining multiple punishments against him, because only one unitary criminal act was presumably involved, the court nevertheless ignored the rationale behind *Whitton* and upheld the prosecutor's argument to the jurors that they could find petitioner guilty of three *separate* acts to constitute the lesser offense. Thus, even though petitioner could not have been *charged* with multiple counts, presumably because of the *Whitton* prohibition, the prosecutor obtained the same result by simply *arguing* to the jurors that petitioner had committed separate offenses. Petitioner either committed several criminal acts, only one of which was charged and should have been referred to by the prosecutor, or he committed only one criminal act and the prosecutor should not have been allowed to argue separate offenses to the jurors. Petitioner was therefore deprived of a fundamental right guaranteed to him under the United States Constitution — the right to be fully advised of the charge against him.

Petitioner maintains that, pursuant to the authority of *Drahosh* and *Whitton*, the reversal of his conviction was required. The effect of the prosecutor's closing argument, compounded by the trial judge's refusal to issue a curative instruction, was the same as a duplicitous count in an indictment or complaint. As in *Drahosh*, it is impossible to ascertain whether the jury's verdict was unanimous. Some jurors may have found petitioner guilty of an assault with a dangerous weapon as a lesser included offense of the assault charged in the indictment. However, other jurors may have found petitioner guilty of an assault with a dangerous weapon based on the *uncharged* pointings of

the rifle as requested by the prosecutor. These conflicts justify the grant of certiorari to review the judgment below.

B. The Federal Questions Involve The Substantial Derogation Of Petitioner's Rights To Procedural Due Process.

Although the right to a unanimous verdict in a criminal trial is statutorily protected in Alaska by Alaska Criminal Rule 31(a), petitioner submits that it is a right which is also protected by the fourteenth amendment. Hence, the prosecutor's argument violated a constitutional right to a unanimous verdict. Petitioner acknowledges that a plurality of this Court has held that unanimity of jury verdict is not a requisite of due process that is binding on the state courts. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Petitioner respectfully submits, however, that it is now appropriate for this Court to reconsider the question of whether unanimity is so fundamental to the sixth amendment right to trial by jury that it is binding on the state through the fourteenth amendment.

With all due respect to the Alaska Supreme Court, petitioner contends that a determination by this Court, that a unanimous jury verdict in a criminal trial is a federal constitutional right, is necessary in order to prevent further derogation of an accused's rights in the courts of the State of Alaska. If the right was constitutionally, as well as statutorily, guaranteed, it would not be so easily disregarded.

Petitioner's case is not the first in which an accused's rights have been violated by permitting a prosecutor to argue separate, uncharged incidents as constituting adequate grounds for conviction. In *Larson v. State*, 569 P.2d 783, 786-87 (Alaska 1977), the prosecutor also argued to

the jury that the defendant could be found guilty of an assault with a dangerous weapon based on an uncharged pointing of a gun. The Alaska Supreme Court affirmed the defendant's conviction on the grounds that no plain error had been committed, with a strong dissent by one of the justices who did not hear petitioner's appeal.

With respect to the second federal question, petitioner submits that affirmance of his conviction by less than a majority of the Alaska Supreme Court infringed upon his right to appeal and therefore violated notions of procedural due process. Petitioner acknowledges those holdings of this Court which are to the effect that an appeal from a judgment of conviction is not a matter of absolute right, independent of constitutional or statutory provisions allowing such appeal. *Ross v. Moffitt*, 417 U.S. 600 (1974); *McKane v. Durston*, 153 U.S. 684 (1894). However, as was noted by this Court in *Griffin v. Illinois*, 351 U.S. 12 (1956), where appellate review has become an integral part of a state's system, the due process and equal protection clauses of the fourteenth amendment apply. Article IV, Section 2 of the Alaska Constitution and A.S. 22.05.010 provide the Alaska Supreme Court shall have final appellate jurisdiction in criminal cases. Accordingly, petitioner was entitled to due process of law in the appellate determination of his case.

In *Briscoe v. Commonwealth Bank of Kentucky*, 33 U.S. 118 (1834), this Court adopted its practice of requiring, if practicable, that constitutional questions be heard by a full court in order that the decision of the case would be that of the majority of the full court. On appeal, petitioner presented an issue of federal constitutional dimension. Since December 1, 1968, the Alaska Supreme Court has consisted of five justices. However, petitioner's appeal was heard by only three justices. Although Justice

Burke strongly dissented on the constitutional issue, petitioner's conviction was nevertheless affirmed by the two other justices, a minority of the full court. Petitioner submits that this affirmance was so fundamentally unfair as to amount to a denial of procedural due process.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Alaska.

Respectfully submitted,

MILLER, BOYKO AND BELL
EDGAR PAUL BOYKO
ROBERT K. SCHRANER
Attorneys for Petitioner

Robert Dewain MILL, Appellant

v.

STATE of Alaska, Appellee.

No. 2692.

Supreme Court of Alaska

Oct. 20, 1978.

In prosecution on indictment for shooting with intent to kill, wound or maim, defendant was convicted before the Superior Court, Third Judicial District, Anchorage, C.J. Occhipinti, J., of lesser included offense of assault with a dangerous weapon, and he appealed. The Supreme Court, Connor, J., held that: (1) crime of assault with a dangerous weapon does not require a specific intent to do bodily injury to the victim; (2) defendant could not invoke diminished capacity to negate general intent as element of offense of assault with a dangerous weapon; (3) it was error for court to permit State to argue that there had been three separate assaults with dangerous weapon but, in context of case, error was harmless, and (4) sentence to five years' imprisonment, with four suspended, and with recommendation that defendant be considered for parole after one third of his one-year service, was neither excessive nor too lenient.

Affirmed.

Burke, J., dissented in part with an opinion.

1. Assault and Battery 56

Crime of assault with a dangerous weapon does not require a specific intent to do bodily injury to the victim. AS 11.15.220.

APPENDIX A

2. Assault and Battery 49

Defendant could not invoke diminished capacity to negate general intent as element of offense of assault with a dangerous weapon. AS 11.15.220.

3. Criminal Law 1171.1(3)

In prosecution on indictment for shooting with intent to kill, wound or maim, wherein defendant was convicted of lesser included offense of assault with a dangerous weapon, it was error for court to permit State to argue that there had been three separate assaults with a dangerous weapon but, in context of case in which events were required to be viewed as a series of acts, in a short and continuous sequence which amounted to a unitary criminal episode, and in which there was no dispute as to the actual facts and no conceivable way that jury could have been confused, error was harmless.

4. Assault and Battery 100

Sentence to five years' imprisonment, with four suspended, and with recommendation that defendant be considered for parole after one third of his one-year service, was neither excessive nor too lenient for conviction for offense of assault with a dangerous weapon.

Edgar Paul Boyko, Edgar Paul Boyko & Associates, Anchorage, for appellant.

Glen C. Anderson, Asst. Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage and Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before BOOCHEVER, C.J., and CONNOR and BURKE, JJ.

OPINION

CONNOR, Justice.

Appellant seeks to have his conviction for assault with a dangerous weapon reversed. He contends (1) that the crime of assault with a dangerous weapon should be redefined as a crime requiring specific intent; (2) that a defense of diminished capacity should be applicable to crimes requiring only general criminal intent; (3) that the prosecutor made an improper final argument which the trial court refused to mitigate by a curative instruction; and (4) that his sentence should be reduced.

Appellant Mill started a small logging business in Palmer in 1970. In 1973 he hired Douglas Vincent, an independent trucker, to haul lumber from Canada to the mill in Palmer. In May, 1973, appellant arranged with Vincent to have four truck-loads of lumber transported from Canada, at \$600 per load, and he paid Vincent \$2400 cash in advance. Vincent delivered two and one-half truckloads as agreed, but a supplier's shortage delayed his delivery of the rest.

At this time, Mill began to suspect that Vincent was trying to ruin his business. Mill testified at trial that after Vincent had threatened him with the information that the banks were going to withhold capital and also orally threatened to put him out of business, he became suspicious that Vincent had begun to deal directly with Mill's Canadian supplier. Mill further testified that he felt tremendous pressure was being applied to him because he was battling against a state timber sale which excluded small, independent loggers. He stated that he had been offered bribes to cease his opposition to the sale and testified that his instigation of a grand jury investigation of the matter had resulted in the burning of two of his mills by arsonists and the harassment of his wife and family by

threatening telephone calls. He also emphasized the financial importance of the fourth truckload of lumber to his business.

On July 6, 1973, Vincent returned with Mill's last truckload of Canadian lumber. He drove past appellant's Palmer mill with the load, honked his horn, and made an insulting gesture out the window. Mill went out in search of Vincent and the load of lumber and found them at another man's mill.

Mill approached a cabin where he saw Vincent, Vincent's bodyguard, and two other loggers inside. Vincent emerged from the cabin at Mill's beckoning and, when questioned about the lumber, refused to turn it over or to return Mill's money. Vincent then rejoined the others inside the cabin.

At that point, Mill took his rifle out of his truck and positioned it on the window of the cabin. He told Vincent that he wanted to talk and racked the gun when Vincent hesitated. When Vincent stepped over the threshold of the cabin, Mill ordered him to stop his approach. Vincent kept walking toward Mill and, after giving a second unheeded order to stop, Mill shot Vincent in the leg. Mill then stood over the wounded man with his gun and ordered him to write a check for the amount he owed on the lumber. Once he had the check in hand, Mill called the police and an ambulance.

Mill was brought to trial on charges of assault with intent to kill, wound and maim. The jury found Mill guilty of the lesser included offense of assault with a dangerous weapon. The trial court sentenced appellant to one year in prison.

I.

Appellant first contends that we should overrule our

decision in *Thompson v. State*, 444 P.2d 171 (Alaska 1968), and hold that the crime of assault with a dangerous weapon requires a specific intent to do bodily injury to the victim. AS 11.15.220, which defines the offense of assault with a dangerous weapon, as it read at the time of the offense, is itself silent on the issue of intent:

“A person armed with a dangerous weapon, who assaults another with the weapon, is punishable by imprisonment in the penitentiary for not more than 10 years nor less than six months, or by imprisonment in jail for not more than one year nor less than one month, or by a fine of not more than \$1000 nor less than \$100.”¹

Since AS 11.15.220 was modeled on Oregon’s statute, the Ninth Circuit Court of Appeals, acting as Alaska’s territorial appellate court, adopted the Oregon Supreme Court’s construction that the statute requires no specific intent. *Burke v. United States*, 282 F.2d 763, 768 (9th Cir. 1960). In following *State v. Godfrey*, 17 Or.300, 20 P.625 (1889), the *Burke* court stated:

“We interpret these words of Godfrey to mean that a *general intent* to do a harm is required and is necessarily included within the definition of the term ‘assault,’ but not a *specific intent* to do any particular kind or degree of injury to the victim.” (original emphasis)

282 F.2d at 768. We adopted that interpretation in

¹AS 11.15.220 was subsequently amended to read:

“A person armed with a dangerous weapon, who assaults another with the weapon, is punishable by imprisonment for not more than 10 years nor less than six months, or by a fine of not more than \$1000 nor less than \$100, or both.”

am § ch. 139 SLA 1976.

Thompson v. State, supra. The trial court in the instant case, relying on our decision in *Thompson*, instructed the jury that it need not find that Mill “specifically intended to actually inflict serious bodily injury” in order to convict him of assault with a dangerous weapon. Appellant claims that this was reversible error.

[1] In urging that we overrule *Thompson*, appellant contends that in analyzing what constitutes a dangerous weapon, we have relied principally upon the aggressor’s specific intent to do bodily harm, citing *Thomas v. State*, 524, P.2d 664 (Alaska 1974). He argues that because we have characterized an otherwise innocuous object as a dangerous weapon, when the aggressor used it with the intent to injure his victim, a specific intent to do bodily injury is an integral part of the crime of assault with a dangerous weapon. However, appellant has misconstrued our earlier opinions on this subject. In holding that a telephone could qualify as a dangerous weapon in *Thomas*, we relied on our earlier decision in *Berfield v. State*, 458 P.2d 1008 (Alaska 1969), in which a pair of boots was held to be a dangerous weapon under AS 11.15.220. In *Berfield* it was not the intent of the person wielding the boots to inflict bodily injury on his victim which persuaded us that the boots were dangerous weapons; instead it was the *manner* in which the boots were used:

“The boots were dangerous because they were used as something to fight with — as instruments of offensive combat. They were dangerous in these circumstances because their use was accompanied by the exposure of liability to serious injury to Baker’s head and brain. The fact that such serious injury did not result is not controlling. *It is enough that the manner that appellant*

used his boots to assault Baker was capable of producing serious injury." (emphasis added) (footnote omitted)

458 P.2d at 1009. Thus, we have not previously looked to the aggressor's specific intent in examining what qualifies as a dangerous weapon. Appellant's argument on this point does not persuade us.

Appellant next makes a policy argument that *Thompson* should be overruled. His argument is based on the Model Penal Code and the trend in other states to classify aggravated assault as a specific intent crime.

Section 211.1(2) of the Model Penal code provides in part:

"(2) *Aggravated Assault*. A person is guilty of aggravated assault if he:

(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) *attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.*" (emphasis added)

ALI Model Penal Code § 211.1(2) (Proposed Official Draft 1962). The state, focusing on the language "purposely or knowingly causes bodily injury," argues that subsection (b) of this provision does not always require a specific intent to injure the victim. The state urges that although the term "purposely" implies the necessity for a specific intent to cause injury, the term "knowingly" requires only scienter or general intent. The Model Penal Code defines "knowingly" as follows:

"*Knowingly*

A person acts knowingly with respect to a material element of an offense when:

* * * * *

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result."

ALI Model Penal Code, *supra*, at § 2.02(2)(b). In his treatise on criminal law, Perkins notes that both "purpose" and "knowledge" as used in the provision of the Model Penal Code can constitute intent:

"Intent includes those consequences which (a) represent the very purpose for which an act is done (regardless of likelihood or occurrence), or (b) are known to be substantially certain to result (regardless of desire)."

R. Perkins, *Criminal Law* at p. 747 (1969). Thus it appears clear that the Model Penal Code provision dealing with assault with a deadly weapon does require the specific intent to do bodily injury.

It is true that many states define assault with a dangerous weapon as a specific intent crime. *See Intent to do physical harm as essential element of crime of assault with a deadly or dangerous weapon*, Annot., 92 A.L.R.2d 635 (1963). But the requirement of an intent to do physical harm normally derives from a specific statutory provision, rather than from judicial construction.

Although appellant argues that several other courts have imposed a specific intent requirement upon a statute which was otherwise silent on the issue of intent, the cases which he cites are not squarely in point.² The state argues

²In *State v. Fitzpatrick*, 149 Mont. 400, 427 P.2d 300, 301-02 (1967), the Montana Supreme Court held that specific intent to cause

that the Alaska statute's silence on the issue of intent should not lead us to impose a specific intent requirement, since the legislature has denoted specific mental states when it has found them to be appropriate. One of the statutes cited by the state in support of this argument is AS 11.15.140, which defines the crime of mayhem:

Mayhem. A person who, with malicious intent to maim or disfigure: . . .

* * * * *

(3) assaults another person with a dangerous instrument," (emphasis added)

Also cited by the state as provisions in which the legislature has specified the mental state required are the statutes prohibiting shooting, stabbing or cutting with intent to kill, wound, or maim, (AS 11.15.150); assault with intent to kill or commit rape or robbery (AS 11.15.160); and assault while armed (AS 11.15.190, requiring "intent to prevent the other person from resisting or defending himself.")

In summary, appellant urges that we act where the legislature has not and require an element of specific intent in the crime of assault with a dangerous weapon. We are unpersuaded. No court has implied such a requirement from a statute as silent as ours, and we have no reason to

physical harm was *not* an element essential to the crime of assault with a deadly weapon, citing the Alaska case of *Burke v. United States*, *supra*. In *People v. Katz*, 290 N.Y. 361, 49 N.E.2d 482, 484 (1943), the court held that the use of the term "willfully and wrongfully" in the statute should be construed to require specific intent. In *Green v. Turner*, 409 F.2d 215 (10th Cir. 1969), the Utah statute being interpreted provided that the offense must be committed "with intent to do bodily harm and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned and malignant heart."

overrule our earlier decision in *Thompson v. State*, *supra*. On this point there was no error.

II.

Appellant contends that the jury should have been permitted to consider evidence of his diminished mental capacity as a defense to the general intent crime of assault with a dangerous weapon.

We have previously drawn a distinction between the defense of mental disease or defect, which absolves a defendant from criminal responsibility for any type of crime, and the doctrine of diminished capacity, which acts only to negate a specific mental element or intent necessary to the charged offense.

"The diminished capacity doctrine is based on the theory that while an accused may not have been suffering from a mental disease or defect at the time of his offense, sufficient to absolve him totally of criminal responsibility, the accused's mental capacity may have been diminished by intoxication, trauma, or mental disease to such an extent that he did not possess a specific mental state or intent essential to the particular offense." (footnote omitted)

Johnson v. State, 511 P.2d 118, 124 (Alaska 1973). The doctrine of diminished capacity, then, has a limited function.

Our statute on the "insanity" defense, AS 12.45.083, provides that a person cannot be held responsible for his criminal conduct if at the time of the conduct, as a result of mental disease or defect, "he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." If the doctrine of diminished mental capacity were available to show the defendant's lack of ability to form a general intent

to perform a prohibited act, it would be functionally indistinguishable from the defense of mental disease or defect and would serve only to lessen the degree of mental incapacity necessary to constitute a complete "insanity" defense. The defendant would no longer have to prove that he was substantially incapable of making choices or conforming his actions to law. He would need only prove that his mental capacity had been in some lesser way diminished.

Appellant argues that

"[A] person may be suffering from a mental defect to such an extent that he is incapable of forming even the general intent to do a prohibited act. [This] analysis is applicable to diminished capacity where the illness has such a grasp of the mind that the accused has no possible means of controlling his behavior at the time the action was taken."

Where, as appellant hypothesizes, the accused is substantially unable to control his behavior and conform it to the requirements of the law, he fits within the framework of the defense of mental disease or defect and need not rely on diminished capacity.

Since the discussion of diminished responsibility in *Johnson* is based on California's formulation of the doctrine in *People v. Conley*, 64 Cal.2d 310, 49 Cal. Rptr. 815, 411 P.2d 911, 914 (1966), cited in *Johnson*, 511 P.2d at 124, a discussion of California's approach to this matter may be helpful. California has held assault with a deadly weapon to be an offense requiring only general criminal intent, *People v. Rocha*, 3 Cal.3d 893, 92 Cal. Rptr. 172, 479 P.2d 372, 376 (1971). It has also held that the defense of diminished capacity in the form of irresistible impulse "is received not as a 'complete defense' negating capacity to commit any crime but as a 'partial

defense' negating specific mental state essential to a particular crime." *People v. Noah*, 5 Cal.3d 469, 478, 96 Cal. Rptr. 441, 447, 487 P.2d 1009, 1015 (1971). Recently, the Supreme Court of California noted with approval these two previous decisions in stating that "assault with a deadly weapon is a general intent crime and diminished capacity is not a defense to general intent crimes." *People v. Gauze*, 15 Cal.3d 709, 718, 125 Cal. Rptr. 773, 778, 542 P.2d 1365, 1370-71 (1975) (citations omitted) (dictum).

[2] A defendant whose mental capacities have been diminished may not possess a certain specific mental state or intent essential to the crime. If the doctrine of diminished capacity due to a mental illness or defect were available to show lack of general intent to do an act, it would have the same function as the defense of mental disease or defect. We are not aware of any jurisdiction in which diminished capacity can be invoked to negate general criminal intent by a defendant who does not plead mental disease or defect as a defense. We hold that the trial court did not err in giving its jury instructions on this subject.

III.

Although appellant was indicted for shooting with intent to kill, wound or maim, the jury was instructed that it could convict him of the lesser included offense of assault with a dangerous weapon. In its closing argument, the state argued that Mill committed three separate assaults with a dangerous weapon: (1) when he pointed the gun through the window at the men inside the cabin; (2) when he actually shot Vincent in the leg; and (3) when he stood over Vincent with the gun until Vincent wrote him a check. The state argued that any of those incidents could support a conviction of assault with a dangerous weapon.

The thrust of appellant's argument is that since he was indicted only for shooting with intent to kill, wound or maim, he could only be convicted of the assault with a dangerous weapon which was a lesser included offense of the shooting. It is argued that pointing the gun at Vincent through the window or after Vincent had been shot were separate actions which had never formed the basis of any criminal charge against Mill. He contends, therefore, that they could not amount to lesser offenses included within the shooting charge.³

[3] We note that the indictment set forth the time, place, victim, and offense charged. That offense necessarily included assault with a dangerous weapon. Appellant cannot claim that he was unfairly surprised by the prosecution's argument to the jury, for appellant himself testified to the events which preceded and followed the shooting. We view these events as a series of acts, in a short and continuous sequence, which amount to a unitary criminal episode.⁴ We believe that it was error for the court to permit the state to argue that there were three separate assaults with dangerous weapon. In the context of

³Prior to the commencement of closing arguments, appellant's attorney objected to the state arguing three separate incidents of assault with a dangerous weapon, and after the argument, requested that the court give a curative instruction.

⁴As the state points out, to accept appellant's argument would mean that every movement of a rifle barrel would require a distinct criminal charge. If this case were presented to us in a converse form, *i. e.*, whether appellant's conduct could sustain three separate convictions, we would indeed have difficulty in upholding such a result. Apart from double jeopardy considerations, see *Whitton v. State*, 479 P.2d 302 (Alaska 1970), the rule of lenity would come into play. In marginal cases doubts should be resolved against turning a single transaction into multiple offenses. See *Bell v. United States*, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955), *Ladner v. United States*, 358 U.S. 169, 79 S.Ct. 209, 3 L.Ed.2d 199 (1957).

this case, however, in which there was no dispute as to the actual facts and no conceivable way that the jury could have been confused, we conclude that the error was harmless.⁵

IV.

[4] Mill was sentenced to five years imprisonment, with four suspended, and with the recommendation that Mill be considered for parole after one-third of his one year service. Appellant claims that this sentence is excessive, given his lack of any prior record and the unique circumstances of the shooting. Our review of the record reveals that the court properly weighed the criteria of *State v. Chaney*, 477 P.2d 441 (Alaska 1970). In our opinion the sentence was not clearly mistaken. Similarly, we are not convinced by the state's argument that the sentence was too lenient.

AFFIRMED.

RABINOWITZ and MATTHEWS, JJ. not participating.

BURKE, Justice, dissenting in part.

⁵*Love v. State*, 457 P.2d 622 (Alaska 1969).

I dissent from the holding set forth in part III of the majority opinion.

I begin with a premise that is a fundamental rule of law: One may be prosecuted and convicted for only those crimes that have been charged against him. The importance of this rule cannot be denied; at the very least it provides a means of ensuring that in every criminal action the defendant will know precisely what conduct he or she must seek to explain, refute, or justify.¹ Thus the rule gives substance to that constitutional ideal of due process which affords every member of society the right to be given notice and an opportunity to be heard before being punished for a crime. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297, 308 (1973); *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed.2d 644, 647 (1948); *Alto v. State*, 565 P.2d 492, 495 (Alaska 1977). Article I, section 11 of the Constitution of Alaska specifically provides that "[t]he accused is entitled to be informed of the nature and cause of the accusation."

This is not to say that when one is charged with an offense he or she must always be either convicted of that specific crime or fully exonerated for his or her acts. On the contrary, where the elements of the charged offense necessarily subsume the elements of one or more lesser offenses it is logically implied that those lesser offenses have been charged as well. Thus, while the state may fail to prove that the conduct² of the defendant satisfied all the

¹Alaska Crim. R. 7(c) states in part:

The indictment or the information shall be a plain, concise and definite written statement of essential facts constituting the offense charged.

²Conduct here refers to both the mental and physical components of that behavior specified as criminal in the indictment.

elements of the explicitly charged offense, it may be successful in proving that that conduct did amount to what is termed a lesser included offense. As we observed in *Jennings v. State*:³

[Alaska] Criminal Rule 31(c) provides that "The defendant may be found guilty of an offense necessarily included in the offense charged" An offense is necessarily included in the offense charged where the former is of less magnitude than the latter but the gravamen of the two offenses is the same, or where one could not have committed the offense charged without having also committed the offense of lesser magnitude. [Footnotes omitted.]

In this case Mill was charged with only one criminal act as a result of his conduct. That offense — shooting with intent to kill, wound or maim — cannot be committed without the offender also committing offense of assault with a dangerous weapon.⁴ Therefore it was possible for the jury to find that Mill lacked the specific intent to kill, wound or maim but that his act of shooting the rifle did constitute the lesser assault offense. Consequently, it was entirely permissible for the prosecutor to argue to the jury that the shooting would support a conviction for either offense.

There would be no question that Mill was convicted of an offense for which he was charged if the assistant district attorney had so confined his argument. Regrettably he did not do so. Instead, he went on to argue, over timely objection by defense counsel that Mill committed two other assaults with a dangerous weapon during the series

³404 P.2d 652, 655 (Alaska 1965).

⁴See footnotes 1 and 2, *supra*.

of events surrounding the actual shooting, stating:

Now, he was guilty of assault with a deadly weapon, or a dangerous weapon at the moment he came up there to that window and pointed that gun at Vincent. At that point he was guilty of an ADW. . . . When he stood over the man and made him write out a check, there's another ADW right there. . . . Of course, when he shot the fellow, if you find that he didn't have the intent to kill, wound, or maim, there's another ADW right there. . . .

In so doing the state's attorney, in my opinion, committed an obvious and fundamental error; that is, he urged Mill's conviction for offenses that were never charged. Although this error might have been cured by instructing the jury to disregard the improper portions of the argument, a request by defense counsel for such an instruction was denied. As a result, it is now impossible to ascertain whether the jury's verdict was based on a determination that Mill committed a lesser included offense of the act with which he was charged, or a determination that he had committed a separate assault that was never charged. Therefore, I believe that we are required⁵ to reverse his conviction and remand the case for a new trial.

Otherwise, I concur.

⁵Alaska Crim. R. 31(a) requires the verdict of the jury in criminal cases to be unanimous.

THE SUPREME COURT FOR THE STATE OF ALASKA

ROBERT DEWAIN MILL,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. 2692

PETITION FOR REHEARING

COMES NOW the appellant herein and respectfully petitions this Honorable court for a rehearing on the grounds that the Court has failed to consider a material proposition of law, as more fully set forth below. Counsel by his signature below certifies that in his judgment this petition is well founded and that it is not interposed for delay.

Appellant's conviction was affirmed on October 20, 1978. The opinion written by Justice Connor was joined in by Chief Justice Boochever. Justice Burke dissented with respect to the issue which Appellant petitions the Court to rehear. Justices Rabinowitz and Mathews did not participate. Thus, the Superior Court was affirmed by only two justices which is less than constitutes a majority of the full court.

APPENDIX B

In this petition, the Appellant does not seek a ruling as to whether three justices are empowered to rule unanimously, without participation by the other two. The narrow question presented is whether two justices can constitute a majority of the Court with the power to affirm or reverse a lower court ruling.

Appellant respectfully submits that the allowance of a majority of the full court to affirm his conviction amounts to a denial of due process under the Alaskan and Federal Constitutions. Ak. Const., Art. 1, § 7. U.S. Const., 14th Amendment.

Article IV, § 2 of the Alaska Constitution provides that the "Supreme Court" shall have final appellate jurisdiction. Since December 1, 1968, the Supreme Court has consisted of five justices. There is no provision in the constitution, in the statutes, or in the Court rules for a quorum less than the entire court. (Ct. 28, U.S.C., § 1 - 2/3 of the United States Supreme Court shall constitute a quorum.) Indeed, the United States Supreme Court will not deliver judgment in cases where constitutional questions are involved unless a majority of the whole court concurs in the opinion. *Bristoe v. Commonwealth's Bank of Ky.*, 33 U.S. 118, 8 L.Ed 887, (1834); *Legal Tender Cases*, 79, U.S., 457, 2d L.Ed 287 (1871).

In the instant case, the affirmance of the lower court's opinion by less than a majority of the court amounts to a denial of the Appellant's right to appeal to the Supreme Court. Since the right to appeal is a fundamental aspect of the criminal process, the violation of the right violates the Due Process provisions in the Alaskan and Federal Constitutions. In this particular case, the denial is especially egregious because (1) no reason was given for the non-participation of the two abstaining justices and (2) the

opinion rendered by the remaining justices overlooked or failed to consider a controlling proposition of law.

The controlling proposition of law is the Due Process clause of the 14th Amendment to the United States Constitution, and the parallel provisions of the Alaskan Constitution. These are violated whenever one is convicted of a crime other than the one with which he is charged; unless the conviction is for a lesser included offense. In the instant case it is impossible to know whether this occurred, since the prosecutor was allowed to argue, over defense counsel's objection, that the defendant was guilty of three *separate* assaults with a dangerous weapon. Obviously, only one of these could have been a lesser included offense within the crime charged: shooting with intent to kill.

The argument that these events were a series of acts, in a short and continuous sequence, which amount to a unitary criminal episode overlooks principles of law which are controlling.

It is unfortunate but true that the word "assault" has two meanings, to wit (1) an attempted battery and (2) an unjustified causing of apprehension. It is only the former which is necessarily included within "shooting with intent". The prosecutor's argument suggested that the unjustified causing of apprehension which may have occurred when the defendant pointed the gun at Vincent through the window may have been the basis for the conviction.

It is also important to note that although the opinion rests on the concept of "a unitary criminal episode", the offending remarks by the prosecutor were quite the opposite. He urged that there were *separate* offenses committed without the benefit of a curative instruction, due process is further violated because there is no guarantee of a unanimous verdict.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests a rehearing before the Court *en banc*.

DATED at Anchorage, Alaska this 30th day of October, 1978.

EDGAR PAUL BOYKO & ASSOCIATES, P.C.

Attorneys for Appellant

THE SUPREME COURT OF THE STATE OF ALASKA

ROBERT DEWAIN MILL,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. 2692

MANDATE

TO: Superior Court the State of Alaska,
Third Judicial distirct at Anchorage.

Robert Dewain Mill filed an appeal from a judgment of the Superior Court, Third Judicial District at Anchorage in Criminal Action No. 73-376 entitled, "STATE OF ALASKA, Plaintiff, vs. ROBERT DEWAIN MILL, Defendant." The case was heard by this court on May 12, 1977. On October 20, 1978 the court filed its written opinion. The Appellant's petition for rehearing was denied on November 28, 1978.

IT IS ORDERED:

The judgement of the Superior Court, entered September 27, 1975, is affirmed.

WITNESS the Honorable Jay A. Rabinowitz, Chief Justice of the Supreme Court, State of Alaska, this day of December, 1978.

Robert D. Bacon

Clerk

APPENDIX C

CONSTITUTIONAL PROVISIONS

Section 1 of the fourteenth amendment to the United States Constitution provides:

Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The sixth amendment to the United States Constitution provides:

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX D

STATUTES

Alaska Statutes, § 11.15.150 provides:

Shooting, stabbing or cutting with intent to kill, wound or maim. A person who maliciously shoots, stabs, cuts, or shoots at another person with intent to kill, wound or maim him is punishable by imprisonment in the penitentiary for not more than 20 years nor less than one year.

Alaska Statutes, § 11.15.220 provides:

Assault with dangerous weapon. A person armed with a dangerous weapon, is punishable by imprisonment in the penitentiary for not more than 10 years nor less than six months, or by imprisonment in jail for not more than one year nor less than one month, or by a fine of not more than \$1,000 nor less than \$100.

Alaska Statutes § 22.05.010(a) provides:

Jurisdiction. (a) The supreme court has final appellate jurisdiction in all actions and proceedings. The supreme court may issue injunctions, writs of review, mandamus, certiorari, prohibiting habeas corpus, and all other writs necessary or proper to the complete exercise of its jurisdiction. Each justice may issue a writ of habeas corpus, upon petition by or on behalf of any person held in actual custody, and may make the writ returnable before the justice himself or before the supreme court, or before any judge of the superior court of the state. An appeal to the supreme court is a matter of right, except that the state shall have no right of appeal in criminal

cases, except to test the sufficiency of the indictment or information and under (b) of this section.

RULES

Alaska Criminal Rule 8(a) provides:

Joinder of Offenses. Two or more offenses may be charged in the same indictment on information in a separate court for each offense if the offense charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common plan or scheme.

Alaska Criminal Rule 31(a) provides:

Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

THE COURT: The right of self-defense is not immediately available to a person who is originally an assailant. I don't think there was any objection to that instruction.

MR. BOYKO: No, I have some problems with it because — but that's tied into another area. It certainly can be argued that when Mr. Mill came to the window with the gun and demanded the appearance of Mr. Vincent outside and reinforced it by clicking the bolt that he was then an assailant, I'm sure that the jury could so find, but since Mr. Vincent was not shot in the course of that purported assault, but came out and Mr. Mill had put down his gun and they were talking, and it wasn't until Mr. Vincent approached him, and according to his testimony — he was ordered to stop according to Mill's — Vincent's testimony until he approached within a certain distance he was shot. I would think that there is no reason to give an assailant instruction, and this is tied intimately with the second point which I think should be both the subject of an instruction or failing that, of a protective order. I think the jury should be instructed that while they may find a lesser included offense of assault with a dangerous weapon, if they do not find the specific intent to shoot, kill, or wound — to kill, wound or maim, that that lesser included offense is — must be encompassed within the specific transaction, that is, the shooting. And that they cannot look for other possible acts of assault which were not charged in the indictment. There are 3 possible assaults with a deadly weapon in this case, if the jury were to believe that this is what happened. One when Mr. Mill stuck a gun through

APPENDIX E

the window, one when he aimed at and shot the defendant in the leg, and (3), which is disputed, of course, when allegedly he stood over him with the gun and forced him to write a check. But the state has seen fit to give notice and to charge only one of these transactions, the actual shooting. And if the jury could find, as a lesser included offense, any conduct of the defendant other than the one in the middle, then theoretically they could find him guilty of 3 separate assaults with a dangerous weapon, and that would certainly exceed the scope of the indictment and the issues in this case, and therefore I'm going to ask the court at this time to give an instruction that the lesser included offense of assault with a dangerous weapon must be, if they find it, must be based upon the same acts or transactions which constituted the shooting. That they cannot consider other incidents that might have amounted to an assault with a dangerous weapon if so charged. And I will also ask that the court make a protective order directing Mr. Merriner that he cannot argue that the poking of the gun into the window was a separate, or could be found by the jury to constitute an assault with a dangerous weapon even though they find the defendant not guilty of any criminal intent in connection with the shooting.

THE COURT: Let me ask Mr. Merriner. You

MR. BOYKO: And I base this on the *Whitton* case which we have given a copy to Your Honor, although the *Whitton* case doesn't address itself to this, but I think it's necessarily implied in what it said there.

THE COURT: No. Mr. Merriner.

MR. MERRINER: Well, I thought we'd argued and had this decided in chambers. I think the position Your Honor has accepted is mine, and that is that there has been sufficient notice to the defense here that we are going to prove an assault, that is, namely the greater offense of

shooting with the intent to kill, wound or maim against Douglas Vincent on this day, and the lesser included offense is an ADW, and he's certainly on notice that we're going to prove this one transaction, namely the whole sequence here of going up to the cabin with the gun, and going clear through to the writing out of the check. And we've charged it against Mr. Mill. I'm certainly not going to argue that there was an assault against Mr. Brittain in the truck or that there was an assault against Mr. Orsini, or Mr. Hitchcock, or Mr. Brittain in the cabin when he first came to the window. But there's been sufficient notice here, and I think it would be ridiculous to instruct the jury to limit my argument to the extent that they are told in some way that you must consider only those split seconds surrounding the shooting. That's just carrying a refinement of the law a little too far, and as far as the *Whitton* case goes, I think it even supports our position in this sense. We can't get multiple sentences in a case like this. I'm quite sure that *Whitton* and *Thesson* would now allow us to sentence this man on 3 separate assaults. Namely, at the window, at the time of the shooting, and at the writing out of the check. We haven't got the same transaction test here, but the *Whitton* identity test, I think would show that this is all one act in the sense that there can't be multiple sentences, and then there is some question in this state as to whether you can even charge multiple counts if the *Whitton* identity test would forbid multiple sentences. The first — no, one of the *Robinson* cases I remember said that in that case we find that the multiple counts going to the jury didn't prejudice the defendant, but it's still an open question and so I think we would have been amiss here if we had charged the multiple counts. As it is we've just charged the greater offense, and the lesser included offenses will then be handled by instructions, and I think we acted proper, and there's been certainly sufficient

notice to the defense that this is the way we're going to proceed.

THE COURT: Very well.

MR. BOYKO: I think it's just the opposite, Your Honor, because the whole purpose of the *Whitton* rule, is that you don't split a single transaction into separate criminal offenses in order to get, as it were, 2 or 3 bites at the same cherry. And what the district attorney is attempting to do here, is get that result without actually doing it on paper. In other words, he makes it one crime in the indictment. Makes him defend against one crime, but he then tells the jury however, there were really 3 crimes committed here, side by side, and you can find him guilty of any one of those, although you can't find him guilty of all 3. And I don't think that's the law. And if that jury comes back under that type of an instruction, and with that type of an argument, with the guilty verdict of assault with a dangerous weapon, which assault will they have found him guilty of? Or maybe of 2 or 3. And that, to me, makes it impossible for us then to appeal on the sufficiency of the evidence, because what if there was sufficient evidence to sustain one, but insufficient evidence to sustain the other. What's the supreme court going to say? Well, which — what — we don't know what the jury had in mind. We don't know whether they were talking about an ADW through the window, an ADW when he was shooting or an ADW when he was standing over him with the rifle. And since we can't tell, and since we feel that one of those is right, and the other ones would be wrong, we're just going to send it right back. That's the only thing that I could do if I were out there under those circumstances. The only thing that I

.....

THE COURT: Well, as I viewed the evidence, Mr. Boyko, I viewed it as one transaction with the defendant

coming forth with a gun, and which led to the shooting. And if the jury believes that he could not form the specific intent for the — intent to shoot — the assault with the intent to kill, wound or maim, they could still find the assault with a dangerous weapon, general intent, or if they buy the defense arguments, they'll find him not guilty. And this is the

MR. BOYKO: No, but that — all that's fine if we're talking about the act of shooting, but Mr. Merriner wants to be able to argue to that jury, well, even if you find him not guilty of anything, at the ti — at the moment of when he shot him, you can still find him guilty of ADW because he stuck the — because a couple minutes before he stuck the rifle through the window, and I said that's a violation of *Whitton*, because that gives him 2 separate bites at the same cherry, which he is not supposed to have. He either — you even have separate offenses, then they must be charged. Or you don't have separate offenses, then you can't use them to bootstrap your one single verdict. What if instead of sticking the gun into the window, he had shot at the defendant — at the victim, and had hit Mr. Brittain, would it still be part of the same transaction? I think not.

MR. BOYKO: Well, but it also — as I understand the law, it don't make any difference who you're aiming at, if you hit somebody else it's still an assault. And it would be a separate act, wouldn't it, from the shooting of Mr. Vincent later on?

THE COURT: Well, if you shoot 3 times and you hit the same person 3 times, you don't get charged with 3 counts of murder.

MR. BOYKO: No, but you may very well get charged with an assault with a dan — assault with intent to kill, wound or maim, and then the second with mayhem, it — but a second time you put his eye out.

THE COURT: Well, I don't think the court would entertain that type of indictment. I viewed it as one complete transaction. I'll let counsel argue that, and let the supreme court decide it.

MR. BOYKO: All right.